No. 85-1708

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

STATE OF CALIFORNIA, *et al.*,
Appellants,

v.

CABAZON BAND OF MISSION INDIANS, *et al.*,
Appellees

On Appeal from the United States Court of Appeals for the Ninth Circuit

APPELLANTS' REPLY TO MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

Page

I

An appeal is proper under 28 U.S.C. § 1254(2) 1

II

The decision below conflicts with decisions of this court and with state court decisions 2

A. The Rice and Colville Decisions 2

B. The Penobscot and Seneca-Cayuga Decisions 3

III

The balancing test supports the application of state and local gambling laws here 5

A. The Tribal interest 5

B. The State interest 6

C. The Federal interest 7

IV

The pendancy of an Indian gambling bill in Congress provides no basis for granting the motion to dismiss or affirm 7

Conclusion 9

TABLE OF AUTHORITIES CITED

Cases

Page

Antoine v. Washington, 420 U.S. 194 (1975) 1

Bryan v. Itasca County, 426 U.S. 373 (1976) 2, 3, 8

Dutton v. Evans, 411 U.S. 74 (1970) 1

Hicks v. Miranda, 422 U.S. 332 (1975) 7

Huron Cement Co. v. Detroit, 362 U.S. 440 (1960) 1

McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) 1

Oklahoma v. Seneca-Cayuga Tribe, 711 P.2d 77 (Okla. 1985) 3, 4

Penobscot Nation v. Stilphen, 461 A.2d 478 (Me.), appeal dismissed, 464 U.S. 923 (1983) 3, 4

Rice v. Rehner, 463 U.S. 713 (1983) 2, 3, 8

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 1, 2

Washington v. Confederated Tribes of the Colville Reservation (Colville), 447 US. 134 (1980) 3

Statutes

18 U.S.C. § 1161 2

25 U.S.C. §§ 1721-1735 4

28 U.S.C.:

§ 1254(2) 1

§ 1257 1

Cal. Bus. & Prof. Code §§ 19400-19667 6

Cal. Govt. Code §§ 8800 et seq. 6

Cal. Pen. Code § 326.5 6

Public Law 280 4

Other Authorities

H.R. 1920 ..... 7, 8, 9

Supreme Court Rule 17(a) 3, 4

132 Cong. Rec. H2016, 99th Cong., 2d Sess. (April 21, 9186) 9

APPELLANTS' REPLY TO MOTION TO DISMISS OR AFFIRM

This brief responds to the Tribes' motion to dismiss the appeal or affirm the lower judgment.

I

AN APPEAL IS PROPER UNDER 28 U.S.C. § 1254(2)

The Tribes argue that this appeal is not proper under 28 U.S.C. § 1254(2) because the Ninth Circuit did not invalidate State laws here. Tribe Br. 6-7. In fact, California gambling laws are meant to apply on Indian reservations as elsewhere, and the Ninth Circuit invalidated California laws as applied on Indian reservations. Indeed, the Tribes' action seeks a declaratory judgment overturning State and local gambling laws as applied on Indian reservations. The Tribes argue that "California laws were left untouched" in that the Ninth Circuit did not strike down California's gambling laws in all cases. Tribe Br. 6. An appeal is clearly proper, however, where a state statute is struck down only "as applied." *Dutton v. Evans*, 411 U.S. 74 (1970). Although the Tribes assert that the Ninth Circuit "did not mention any specific California statute," Tribe Br. 6, the Ninth Circuit fully described California's gambling laws, JS App. 2; made repeated references to California's "bingo statute," "bingo law," and "gambling laws," *id.* at 2, 3, 5, 7, 8; and concluded that California could not apply its "gambling laws" on Indian reservations and enjoined California from so applying its "gambling laws." *Id.* at 11. Thus, the Ninth Circuit clearly held that California's gambling laws are invalid as applied in this case.[1]

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[1] Further, appeals are proper under 28 U.S.C. § 1257 when taken from state court decisions *upholding* state laws as applied on Indian reservations. See, *e.g.*, *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Antoine v. Washington*, 420 U.S. 194 (1975); *cf. Huron Cement Co. v. Detroit*, 362 U.S. 440 (1960). In light of the "history of . . . close relationship between" sections 1254(2) and 1257, *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 247 n. 9 (1984), an appeal should be equally proper when taken from federal appellate decisions *invalidating* state laws as applied on Indian reservations. The

II

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND WITH STATE COURT DECISIONS

A. The Rice and Colville Decisions

In *Rice v. Rehner*, 463 U.S. 713 (1983), this Court held that Indian tribes do not have a sovereign right to sell products to non-Indians in violation of state law, and that the state has the right to regulate such sales under the balancing test. JS 6-7. The Tribes argue that *Rice* is distinguishable because *Rice* primarily interprets and applies a federal statute—18 U.S.C. § 1161—not relevant here. Tribe Br. 15. The Tribes also argue that *Rice* is distinguishable from *Bryan v. Itasca County*, 426 U.S. 373 (1976), because different statutes were involved in the two cases. Tribe Br. 14-15.

In *Rice*, however, this Court primarily applied the balancing test—which is a form of federal common law—and concluded that state interests outweigh tribal interests because of the absence of a sovereign tribal "tradition." 463 U.S. at 720-735. After applying the federal common law, the Court then ruled that the federal statute, 18 U.S.C. § 1161, did not preempt state laws and indeed supported their application. *Id.* at 725-735. Thus, the analytical mode was that the common law balancing test supported the application of state law, and that the federal statute did not change the result and indeed supported it. *Rice*, insofar as it applied the balancing test, is thus not distinguishable here. After

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question whether the statute is "valid," which is the focal inquiry in both sections, is the same in both cases.

Contrary to the Tribes' argument, this Court's decision in *Silkwood v. Kerr-McGee, supra*, does not hold to the contrary. Tribe Br. 6. In *Silkwood*, the federal appellate court invalidated a *discretionary* act by a lower federal court in granting a punitive damages award under authority of a state statute, rather than invalidating the statute itself. Here, the Ninth Circuit directly invalidated California's bingo statutes as applied, and did not invalidate an intervening administrative or bureaucratic action. Indeed, unlike *Silkwood*, this case involves an action for declaratory relief directly challenging the statute itself.

Rice. *Bryan* creates the anomaly that a federal statute intended to broaden state jurisdiction over Indian reservations—Public Law 280—actually confers less jurisdiction than states already have under the common law as interpreted and applied in *Rice*. JS 14.

In *Washington v. Confederated Tribes of the Colville Reservation (Colville)*, 447 U.S. 134 (1980), this Court held that Indian tribes cannot "market an exemption" from state laws to non-Indians. JS 6-7. The Tribes argue that *Colville* is distinguishable because the Tribes here, unlike those in *Colville*, are providing "value" to non-Indians. Tribe Br. 24. In *Colville*, however, as in *Rice*, this Court emphasized that Indian tribes do not have a "vested right" to market products to non-Indians, *Colville*, 447 U.S. at 155, 157; *Rice*, 463 U.S. at 721 n. 7, and did not suggest that the result depends on whether "value" is provided. Indeed, the State interest is stronger here than in *Colville*, because California here absolutely prohibits the particular activity. The Tribes, in "marketing an exemption" from state laws, are allowing non-Indians to engage in conduct forbidden under State law. If Indian tribes can market such exemptions, there is little reason for the State to maintain its bingo prohibitions even in off-reservation areas, and thus the tribal games render California's bingo policy largely pointless.

B. The Penobscot and Seneca-Cayuga Decisions

The Ninth Circuit decision conflicts with the State court decisions in *Penobscot Nation v. Stilphen*, 461 A.2d 478 (Me.), *appeal dismissed*, 464 U.S. 923 (1983), and *Oklahoma v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Okla. 1985), both of which, applying the common law balancing test, hold that states have the right to prohibit tribal bingo games that cater primarily to non-Indians. JS 11-12. The Tribes argue that the Ninth Circuit decision does not conflict with a decision "of the highest court of the state in which the case arose," because the California Supreme Court has never addressed the issue here. Tribe Br. 12. Under Rule 17(a) of the Supreme Court Rules, however, review is appropriate when a federal appellate court decides an issue "in a way in conflict with a state court of last resort," whether or not "the case arose" in that particular state. Therefore, the conflict

here is within the purview of Rule 17(a) whether or not the California Supreme Court has addressed the issue.

The Tribes also argue that the Ninth Circuit decision is consistent with an "unbroken line of federal authority" that has addressed the issue. Tribe Br. 11. The federal decisions cited by the Tribes, however, considered only whether a federal statute—Public Law 280—authorizes state gambling laws to be applied on Indian reservations, and did not consider whether such application is authorized under the common law balancing test applied in *Rice*. The Ninth Circuit decision here is the *only* federal appellate decision applying the balancing test in this context, and its decision squarely conflicts with the State court decisions in *Penobscot* and *Seneca-Cayuga*.[2]

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[2] The Tribes also argue that the Ninth Circuit decision does not conflict with *Penobscot* and *Seneca-Cayuga*. Tribe Br. 12-13. *Penobscot* is distinguishable, they argue, because the Maine Court primarily interpreted and applied a federal statute, the Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §§ 1721-1735. Tribe Br. 13. As explained in our Jurisdictional Statement, this holding was a second, alternative holding. JS 11 n. 6. The first, primary holding was that the "federal Indian common law" authorizes the application of State gambling laws on Indian reservations. 461 A.2d at 482-487.

Seneca-Cayuga is distinguishable, the Tribes argue, because the Oklahoma Court "reserved judgment" on the question whether the State can prohibit the tribal games and "remanded" the case for further "balancing of interests." Tribe Br. 13. In fact, the Oklahoma Court held that the State could prohibit the tribal games *if* the games are played primarily by non-Indian patrons, and remanded for determination of that limited question. 711 P.2d at 92, and n. 76. Thus, the Oklahoma Court clearly held that State gambling laws are applicable to tribal bingo operations that cater primarily to non-Indian patrons.

The Tribes assert that, because the *Seneca-Cayuga* decision was so "unpersuasive," a federal district court in Oklahoma subsequently rejected its reasoning in upholding a tribal bingo operation in Oklahoma. Tribe Br. 13-14. This scenario, far from showing that the Oklahoma Court's reasoning is "unpersuasive," shows the necessity for this Court to resolve the conflict among lower courts concerning the issue here.

III

THE BALANCING TEST SUPPORTS THE APPLICATION OF STATE AND LOCAL GAMBLING LAWS HERE

A. The Tribal Interest

The Tribes argue that the balancing test, or "particularized inquiry" test, as applicable in determining state jurisdiction over Indian reservations, does not support the application of State and local gambling laws here. Tribe Br. 17-29. They argue, first, that Indians have "traditionally" gambled on their reservations. *Id.* at 25-29. The Ninth Circuit, however, held that whether Indians have traditionally engaged in the "activity" is irrelevant, and instead ruled that Indian tribes have a "sovereign" right to raise revenue regardless of the form of activity by which the revenue is raised. JS App. 10-11. Thus, the Tribes attempt to sustain the lower decision on narrower grounds than those invoked by the lower court, and indeed do not assert the Ninth Circuit's broad view that tribal revenue-raising interests outweigh State regulatory interests. Moreover, the evidence submitted below shows unequivocally that Indian tribes have *not* traditionally engaged in the kind of activity here, and the district court so agreed.[3]

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[3] The State and County submitted a declaration and report by Professor William J. Wallace, Professor Emeritus at California State University, who stated that Indian tribes have not traditionally conducted high stakes, gambling operations catering primarily to non-Indians, and that tribal economic bases have not traditionally depended on such operations. CR 58, Exh. 16. The Tribes submitted a declaration and report by Professor Lowell Bean, cited extensively in the Tribes' brief, that disagreed with certain minor aspects of Wallace's declaration and report. Tribe Br. 25-27. Significantly, Professor Bean did not challenge Professor Wallace's main conclusion that Indian tribes have not traditionally conducted the kind of gambling activity involved here, but argued only that the tribal bingo operations are an "adaptation" of the cultural tradition. Tribe Br. 26. The district court rejected the Tribes' argument, concluding that Indian tribes have not "traditionally" engaged in the type of activity here. RT 4:10-22.

B. The State Interest

The Tribes argue that there is "no evidence" of organized crime involvement here, and thus that California has no interest in prohibiting the tribal games. Tribe Br. 20. California's interest, however, is in preventing criminal infiltration before it becomes an established fact, not simply correcting the problem after it has occurred. Moreover, contrary to the Tribes' assertion that California "stipulated" to the lack of organized crime here, Tribe Br. 20, the stipulation was carefully drawn to state only the the State and County "do not allege" the presence of organized crime here. CR 54, ¶ 33. The State and County made this stipulation to ensure that the ultimate decision would not turn on whether organized crime exists in the case, a factor that would limit the precedential value of the decision and is irrelevant in any event. Although the Tribes assert that the Cabazon Tribe has an effective security force, Tribe Br. 20, a representative of the U.S. Department of Justice recently declared that "the 25-member Cabazon Band . . . cannot adequately deal with the influx of hundreds of players. . . ." Amici Curiae Brief of *State of Florida, et al.*, at 11.

The Tribes also assert that tribal bingo is not contrary to California "public policy" because California authorizes bingo for charitable purposes, and also authorizes other forms of gambling, such as a State lottery and horse-racing. Tribe Br. 17-19. To the extent that California authorizes gambling, however, California regulates and controls the activity to ensure that organized crime will not gain control of the operation. Charitable bingo, horse-racing, and the State lottery are subject to extensive regulatory controls to preclude organized criminal infiltration. See Cal. Pen. Code § 326.5 (bingo); Cal. Bus. & Prof. Code §§ 19400-19667 (horse-racing); Cal. Govt. Code §§ 8800 *et seq.* (State lottery). The tribal games, however, are not regulated and controlled, and each tribe is free to adopt any form of gambling that it wants and to regulate the gambling as it sees fit. Thus, contrary to the Tribes' argument that California is preventing the Tribes from doing what other entities may do under California law, California subjects *all* gambling in California, where authorized, to extensive regulation and control to prevent organized criminal infiltration. The distinction is not, as the Tribes assert, between "charitable"

and "commercial" bingo, but between regulated and unregulated bingo.

C. The Federal Interest

The Tribes argue that federal policy supports the tribal games here. Tribe Br. 21-23. Congress, however, has not authorized or approved the tribal games, and has not adopted any standards governing them. The Secretary of the Interior does not regulate, supervise, monitor, or otherwise control the games. Thus, no federal regulatory scheme exists here, and no federal policy supports the tribal games here.[4]

IV

THE PENDANCY OF AN INDIAN GAMBLING BILL IN CONGRESS PROVIDES NO BASIS FOR GRANTING THE MOTION TO DISMISS OR AFFIRM

Finally, the Tribes argue that Congress "has studied this issue and is moving rapidly to enact legislation" authorizing Indian tribes to operate bingo free of state legislation. Tribe Br. 7. The House of Representatives has approved a bill, H.R. 1920, that would authorize certain forms of Indian gambling, including bingo, and the bill is pending in the Senate. Even if Congress were "moving rapidly" to enact the legislation, this political development would provide no basis for affirming the lower decision or dismissing the appeal for want of a substantial federal question, since both methods of disposition constitute a ruling on the merits. See, *e.g.*, *Hicks v. Miranda*, 422 U.S. 332, 345 (1975). Moreover, contrary to the Tribes' assertion that Congress is "moving rapidly" to enact the bill, the most recent information

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[4] The presidential policy statement cited in the Tribes' brief states only that Indians are to be encouraged in economic development, Tribe Br. 21, but does not indicate that this goal is to be achieved by gambling operations that violate state and local laws. The two declarations by officials of the U.S. Bureau of Indian Affairs cited by the Tribes, Tribe Br. 22-23, although expressing general support for the tribal position, are not the equivalent of a federal regulatory scheme, and cannot be regarded as a definitive statement of federal policy in any event.

available to us indicates that Senate approval is doubtful because of growing opposition both from the states and from various Indian tribes. Therefore, it would not be appropriate to grant the motion to dismiss or affirm on the doubtful contingency that the Senate will approve the bill.

Further, this case presents broad questions concerning state jurisdiction over Indian reservations that transcend the gambling context in which the case arises, and H.R. 1920, which is limited to gambling, does not purport to address these broad questions. As Washington duly notes in its amicus brief, the case raises the broad question whether Indian tribes can market products and engage in other activity in violation of state and local laws. The Ninth Circuit held that Indian tribes have a sovereign right to raise revenue by marketing products to non-Indians, and that this sovereign right exists apart from whether the "activity" itself is within the tribal tradition. JS App. 10-11. The Ninth Circuit decision is thus much broader than the gambling question. Also, this case presents an opportunity for this Court to resolve the conflict between its decisions in *Rice* and *Bryan*, JS 14-15, a conflict that transcends the gambling question. This case is devoid of extraneous factual matter that might prevent a determination of these significant Indian law questions. Therefore, this case presents fundamental questions concerning state and tribal relationships that is broader than the gambling question.

Further, H.R. 1920 is premised on an interpretation of federal Indian law that is in issue here. As the Tribes note, the bill declares, as its premise, that Indian tribes have an "exclusive right" to conduct gambling operations except where "specifically prohibited" by federal law or where contrary to state "public policy." Tribe Br. 9. Thus, the bill assumes the validity of the Ninth Circuit's "public policy" test, and the validity of that test is in issue here. Indeed, Representative Udall, the primary author of the bill, argued in the House that the bill does not establish new principles of federal Indian law, but instead simply incorporates the principles already established by the federal courts. Representative Udall stated:

> "It should clearly be understood that H.R. 1920 does not make gambling on Indian reservations legal. The federal courts have held that gambling on Indian reservations is legal and not subject to state licensing and regulations where the state makes that gambling activity legal under its laws. *H.R. 1920 accepts the state of the law.*
>
> "What it does is to impose federal standards on those activities which are otherwise determined to be legal under existing federal-Indian law." 132 Cong. Rec. H 2016, 99th Cong., 2d Sess. (April 21, 1986) (emphasis added).

Therefore, H.R. 1920 assumes the validity of the Ninth Circuit decision here, which is the very issue raised here. It would be appropriate for this Court to provide guidance to Congress concerning the proper common law relationship between the states and Indian tribes.

Finally, even if H.R. 1920 is enacted, the bill would not resolve the immediate question here. The bill, as noted above, adopts the Ninth Circuit's "public policy" test, which is an outgrowth of *Bryan's* "civil regulatory-criminal prohibitory" distinction. Therefore, even if the bill is enacted, this Court will still need to determine whether California's gambling laws are "civil regulatory" or "criminal prohibitory," and whether such laws are supported by State "public policy."

For these reasons, this Court should note probable jurisdiction and resolve the matter in the normal course. Alternatively, the Court may wish to note probable jurisdiction and defer consideration on the merits until the Senate has had an opportunity to act on H.R. 1920. The Court should not grant the motion to dismiss or affirm since such disposition is a ruling on the merits.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court note probable jurisdiction and set the matter for plenary consideration.

Respectfully submitted,

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